MALAYSIAN INTERNATIONAL MERCHANT BANKERS BHD.

v.

G & C SECURITIES SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
MAHADEV SHANKAR J
[SUIT NO. C-23-1657-86]
28 MARCH 1988

CONTRACT: *Bank loan secured by charge and guarantee - Whether charge should be realised before borrower and guarantor could be sued.*

This was an appeal against the decision of the Senior Assistant Registrar who entered summary judgment for the plaintiff. The plaintiff gave a loan to the first defendant for a housing project. The said land was charged as security. The second defendant executed a guarantee. The plaintiff produced a statement of accounts certified by the bank manager showing the principal and interest owed. The defendants contended that the interest charged was a penalty and that the charge should have been realised before the suit was filed.

Held:

[1] The interest which was charged was contractually agreed upon between the parties. It was provided in the charge that the certificate by the bank as to the interest payable was conclusive and binding in the absence of any manifest error. The defendants did not show that there was such an error.

[2] It was contractually agreed upon between the parties that the plaintiff could recover the loan by instituting a direct action against the defendants. Under the terms of the charge, the plaintiff was not obliged to enforce the charge first. The plaintiff was entitled to proceed simultaneously against the second defendant who was the guarantor as provided in the guarantee agreement.

[Appeal dismissed with costs.]

Case referred to:
Bank Bumiputra Malaysia Bhd. v. Esah bt. Abdul Ghani [1986] CLJ (Rep) 41

Other source referred to:
Contracts, Chitty, 25th Edn., Vol. 2, para. 4425

For the plaintiff/respondent - H.Y. Too; M/s. Shook Lin & Bok
For the defendant/appellant - Kanesalingam; M/s. Kanesalingam & Co.

JUDGMENT

M. Shankar J:

This is an appeal by the defendants against the decision of the Senior Assistant Registrar giving the plaintiffs summary judgment.

On 14 December 1982 the plaintiffs (the Bank) gave a loan to the 1st defendant (the company) of RM665,000. By way of security the company executed a charge in favour of the Bank. The money was required to carry out a project to build three bungalows on three lots of land. All three lots were the subject of the charge. The same day the charge was executed the 1st defendant who was the director of the company executed a written guarantee for the repayment on demand of all sums owing by the company.

Thereafter monies were advanced but evidently the loan was not repaid in accordance with the wishes of the bank. On 31 March 1986 they claimed that there was due and owing to them by way of balance of principal and interest thereon the sum of RM335,958.52.

The bank through either solicitors demanded the repayment of the debt by AR Registered letters from the 1st and the 2nd defendants. But the defendants failed to pay and the bank's solicitor initiated this action against the company and the 2nd defendant.

Shortly after appearance was entered the bank filed the application for summary judgment. In the affidavit in support of the application the bank exhibited the guarantee and a statement of account certified by the bank manager setting out the balance of principal and interest owing by the defendants.

When the matter first came up before the Senior Assistant Registrar on 12 December 1986 Counsel for the defendant took the point that the application was irregular because the bank had not exhibited the basis of their claim against the company. So plaintiffs' Counsel requested an adjournment to file this evidence. The adjournment was granted. On 22 December 1986 a supplementary affidavit was filed by the bank manager attaching the charge executed by the company. The covenants in the charge spelt out the indebtedness of the 1st defendant and the manner of its proposed resolution. On 5 January 1987 the 2nd defendant on behalf of himself and the company filed an affidavit in reply. Objection was taken to the application for summary judgment on two grounds :- firstly that the rate of interest of 5% above cost of funds instead of 3% above cost was a penal rate of interest and therefore harsh and unconscionable and secondly that since the Bank had already instituted foreclosure proceedings under the charge it should not be permitted to maintain the present action. At the hearing before the Senior Assistant Registrar on 7 January 1987 the only argument advanced on behalf of the defendant was that the charge should be raised first before the suit was proceeded with.

With this submission the Senior Assistant Registrar did not agree and gave judgment for the plaintiff with costs. So the defendants appealed to me.

I will now deal with the submissions made by defence Counsel and the Court's responses thereto.

First it was submitted that the effect of s. 11.03 of the charge was that the bank was obliged first to have the properties sold and only then was it entitled to sue the company or the guarantor for the balance. The defendants contended that since the bank could obtain a foreclosure order in a separate application they were not entitled to file this suit.

With respect to Counsel for the defence I am unable to agree that s. 11.03 of the charge imposes any such obligation upon the bank. All that it says in simple language is that if the proceeds of the sale of the land were insufficient to settle the debt the company would continue liable to pay the balance still due. Article 10 of the charge imposed a liability on the company to pay the balance of the loan on demand together with the interest thereon. It is the opinion of this Court that this contractual obligation could be enforced by direct action against the company. So far as the 2nd defendant was concerned Clause 3 of the guarantee provided that all monies due from the company could nevertheless be recoverable from his as principal debtor, and Clause 4 provided that the guarantee was in addition to and not in substitution for any other rights which the bank may have had under the charge. Clearly therefore it was open to the Bank to proceed simultaneously against the 2nd defendant as well.

Defence Counsel submitted a number of English authorities to the effect that contracts of guarantee should be construed strictly in favour of the guarantor and that no liability should be imposed on him which is not clearly and distinctly covered by the contract. (See *Chitty on Contracts* 25th Edn. Vol. 2 para. 4425 and the cases therein cited.)

Upon any construction of the loan document I am unable to say that the bank was not strictly within its rights in acting as they did. Consequently this objection is without substance.

The next point that was taken was that the sum claimed already included interest and since no explanation was given as to how this figure was reached the bank was not entitled to judgment. However s. 3.06(d) of the charge specifically stated that the bank's certificate as to the interest rate applicable for any interest period shall, in the absence of any manifest error, be conclusive and binding on the company. Clause 12 of the guarantee agreement provided likewise. The defendants made no effort whatsoever to show that there was any manifest error or at all in the bank's certificate and consequently I hold that this submission is also without substance.

What appears to have incensed the defendants is that the bank should be endeavouring to make recovery against them personally whilst the security was still unsold. I made some observations about this in my judgment in *Perwira Habib Bank v. Gemintan & Ors* (K.L. High Court Civil Suit No. 1107 of 1986-Unreported). The position in law in Malaysia has already been concluded by the Supreme Court in *Bank Bumiputra Malaysia Bhd. v. Esah bt. Abdul Ghani* [1986] CLJ (Rep) 41.

The formula used by the plaintiffs for computing interest is nothing more than what they are entitled to do under the loan documents.

Accordingly this appeal must be dismissed with costs to be taxed and paid by the defendants to the plaintiffs.

Also found at [1988] 2 CLJ 87